IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-208

ISSAC KAPLAN d/b/a INSJARL REALTY CO., for an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

Appellant,

-against-

JEROME PRINCE, FRANK A. BARRERA, IRVING H. STOLZ, PAUL A. VICTOR, MARC A. GOODMAN, JACOB B. WARD, MARTY MARKOWITZ & ROBERT C. WEAVER, being members of the CONCILIATION AND APPEALS BOARD, and the HOUSING AND DEVELOPMENT ADMINISTRATION,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION-FIRST JUDICIAL DEPARTMENT

# MOTION OF APPELLEE CONCILIATION AND APPEALS BOARD TO DISMISS OR AFFIRM

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The Appellee moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of the State of New York, Appellate Division, First Depart-

ment on the ground that no substantial federal question is raised warranting review by the United States Supreme Court.



## STATEMENT

The appellant is the owner of a 62 unit luxury apartment building located in New York City. The building is registered with the Rent Stabilization Association, which means that the owner has voluntarily accepted the benefits and obligations of regulation under the Rent Stabilization Law. The benefits include regular periodic rent increases in amounts designed to keep the owner abreast of inflation and to continue to properly maintain his building and provide services to the tenants. The obligations include providing the same level of services which were provided on the statutory base date——May 31, 1968, and obedience of orders issued by the Conciliation and Appeals Board (the appellee, hereinafter referred to as the Board), the quasi-Judicial enforcement arm of the rent stabilization system.

On May 31, 1968, the owner, portraying the building to prospective tenants as a "full service" building, provided 24 hour manned elevator service. Thus, when the

owner brought his building into the rent stabilization system in 1969, the law required him to continue to maintain his building at the May 31, 1968 level; and thus continue providing 24 hour manned elevator service. The guidelines increases, including factors for payroll, assured him continued base date level profits (and if not fully adequate in his case supplemented by a hardship increase upon applying therefor —an act never taken by the owner.)

The owner first attempted to curtail manned elevator service in 1970. However, the tenants complained to the Board that such curtailment had resulted in a reduction in building security. The Board ruled that 24 hour manned elevator service was a required service under the Rent Stabilization Law and Code as to the building in question and directed the owner to restore the service in full. The Board's order was subsequently affirmed by the Supreme Court of the State of New York, held in and for New



York County.

Thereafter, in 1975 the owner completely eliminated manned elevator service in direct violation of the Board's previous order and in disregard of prior written notice by the Board, warning him of the illegality of such actions. The owner asserted that there was no longer a need for the elevator operators because he had installed a closed circuit television monitor which served the same security function as the dismissed elevator operators.

The Board held a full oral hearing of the parties, at which the owner appeared with counsel, presented witnesses on his behalf, and cross-examined all adverse witnesses. On the basis of the undisputed evidence of record, the Board found that 24 hour manned elevator service was a required service under the Rent Stabilization Law and Code; that the television monitor did not compensate for the security lost due to the dismissal of the elevator opera-

tors; and that the owner had willfully violated the Board's prior order. The Board's order directed the owner to restore 24 hour manned elevator service and, within the authority granted to it by the Rent Stabilization Law and Code, the Board ordered the owner to pay a fine of $3,500.00.

The owner challenged the Board's order in the New York State Supreme Court, New York County. That Court affirmed the Board's order in all respects. The owner then appealed to the Appellate Division, First Department. That Court unanimously affirmed the judgment of the lower court, and subsequently denied the owner's motion to reargue before the Appellate Division or, alternatively, for leave to appeal to the New York Court of Appeals. The owner next made a motion to the New York Court of Appeals for leave to appeal. That motion was denied.

The appellant now seeks to invoke the appellate jurisdiction of this Court by raising a series of sweeping and unfounded



arguments against the constitutionality of the Rent Stabilization Law of 1969, as amended, as well as rent regulatory laws in general. Although the Supreme Court has repeatedly and consistently upheld rent regulatory statutes against myriad constitutional challenges, appellant now seeks to rehash the same issues laid to rest in earlier case law. His approach is a shotgun constitutional attack. Significantly he submits not a single supporting appellate court decision or a scintilla of evidence to show this is other than a frivolous claim.

For example, appellant asserts there has never been a housing emergency in the City of New York warranting the passage of the Rent Stabilization Law. His papers are devoid of a single citation or shred of evidence to discredit the battery of objective data upon which the City and State of New York rely in determining that a serious housing emergency continues to exist.

The appellant also contends that he

was denied his due process right to be heard; yet the record clearly shows that the appellant was afforded ample opportunity to be heard through a full oral hearing as well as written submissions, and the evidence adduced generated no material issue of fact to be resolved by the Board.

Clearly, the appellant's constitutional arguments are wholly lacking in any basis in law or fact. Thus, the appellant's contentions, which have been heard and unanimously rejected by the New York Courts, do not present a substantial federal question warranting review by the Supreme Court.



## THE PRECURSORS OF THE RENT STABILIZATION LAW

The Rent Stabilization law of 1969 as amended by the Emergency Tenant Protection Act of 1974 is the most recent in a series of laws passed by the City and State of New York in an effort to curb unjust and unreasonable rents in urban areas afflicted by an acute and enduring housing shortage. Laws of this nature first appeared in New York in the early 1920's with the enactment of the Emergency Housing laws of the State of New York (Chapters 942-953, Laws of 1920). Thereafter, Congress instituted rent regulation which became applicable to New York in 1943 through the National Price Control Act (Pub. L.421, 77th Cong.; 56 Stat. 23; 50 U.S.C. Sections 901-946).

In 1950, New York State assumed responsibility for rent regulation from the federal government by enactment of the Emergency Housing Rent Control Law of 1950 (Chapter 250, Laws of 1950). Then in 1962 New York State

delegated the authority to regulate rents within New York City to the City by enacting the Local Emergency Housing Rent Control Act of 1962 (Chapter 20, Laws of 1962) otherwise known as the State Enabling Act; and the New York City Council promptly exercised this authority by passing the City Rent and Rehabilitation Law (Local Law No. 20, Laws of 1962) thus continuing standard rent controls within the City under the City's direct administration. The Rent Control Law, which is enforced by the City's housing agency, has been renewed periodically since 1962 based on triennial surveys of the availability of rental housing, and remains in effect to the present day because of the continued existence in New York City of a vacancy rate far below the 5% level statutorily determined to trigger decontrol.

## THE RENT STABILIZATION LAW

The Rent Stabilization Law of 1969 (Local Law 16, Chapter 51, Title YY Administrative Code of the City of New York) was



enacted by the New York City Council pursuant to the same State Enabling Act which authorized the passage of the Rent Control Law and is also predicated upon the surveys of vacancy rates in New York City.

The purpose of the Rent Stabilization Law was to extend rent regulation to a category of dwellings which the Rent Control Law had left to the vagaries of the free market, i.e., multiple dwellings completed after World War II. The abundancy of post-war housing until the late sixties precluded the need for its regulation. However, forces in the market place created both a severe shortage of supply and the inflationary spiralling of rent, preconditioning the need for regulation. The local legislative body chose a form of rent regulation substantially different (and perhaps more modern in its approach) from standard rent controls. The City Rent Law continued to regulate the City's 1,200,000 pre-war housing; the Rent Stabilization Law regulated 375,000 post World War II and a

small number of pre-war luxury decontrolled apartments.

The two co-existing systems retained their respective jurisdictions until 1971, when the State of New York enacted the Vacancy Decontrol Law (Chapter 391, Laws of 1971). This law provided for the automatic deregulation of both rent controlled and rent stabilized apartments upon vacancy. The framers of the law thought this bill would encourage new construction and rehabilitation of existing housing. That purpose was not realized. Instead, a Temporary State Commission on Living Costs found unbridled inflationary forces had been set loose, which, aggravated by the housing shortage, had worsened the conditions in New York City and its environs where the rental housing market is heavily concentrated. In 1974 the New York State Legislature acted to deal with this renewed emergency by substantially repealing the Vacancy Decontrol Law and adopting the Emergency Tenant Protection Act of 1974 (ETPA)



(Chap. 576, Laws of 1974) extending the rent stabilization system to all vacancy decontrolled apartments.

The Emergency Tenant Protection Act thus amended the Rent Stabilization Law to return to its jurisdiction all previously rent stabilized apartments which had been deregulated due to vacancy. The law also placed under rent stabilization all formerly rent controlled apartments which had been decontrolled. ETPA left standard rent control in place for tenants in continuous occupancy since 1971, decreeing that such apartments would become decontrolled only upon vacancy by the controlled tenant. Upon such event, ETPA directs the apartment's transfer to the Rent Stabilization system.

By virtue of ETPA's operation since 1974, New York City's rent stabilization system has grown from its original jurisdiction over 375,000 apartments to jurisdiction over more than 850,000 apartments. Standard rent control remains in effect for about 350,000

apartments as it is gradually phased out with each vacancy.

## THE RENT STABILIZATION SYSTEM

The Rent Stabilization Law, like earlier New York rent-regulatory statutes, is grounded upon well established state regulatory powers, and is addressed to a well recognized public need. Yet the Rent Stabilization Law accomplishes its purpose through a system which is entirely distinct from systems established under precursor statutes.

One novel feature of the rent stabilization system is the real estate industry's participatory role subject to government supervision by means of an organized industry association both to fund the system's expenses and police its members' voluntary compliance. Interests of both owners and tenants are equally represented on the administrative arm of the system by providing for four representatives of tenants and four representatives of owners to serve on the quasi-judicial Conciliation and Appeals Board.



(The ninth member of the Board is appointed as the Board's impartial Chairman.) The law also ties rent to periodic review of special Bureau of Labor Statistics Studies of increases in operating costs in rental housing. Owners are thus afforded sufficient rental increases to properly maintain the property; tenants at the same time are protected form inordinate and unwarranted rent increases.

Every owner of a building covered by the Rent Stabilization Law is given the choice of voluntarily accepting the funding and self policing obligations (as well as benefits) of the rent stabilization system or being placed under the City's standard Rent Control Law. If the owner elects the rent stabilization system, he may collect automatic rent increases periodically (called rent guidelines increases) at lease renewal time. An additional vacancy allowance is permitted when renting to a new tenant. These guidelines increases are intended to

keep the owner whole—that is, to afford him the same financial return upon his investment which he received on the base date when the premises was on the free market. In return the owner is obligated by the Rent Stabilization Law to properly maintain his building and base date services and is barred from evicting the building's tenants without cause. The guidelines are City-wide percentages; where they prove inadequate, the law provides a hardship remedy to restore the owner to his base date free market financial posture.

The various functions of the rent stabilization system are performed by four separate and independent entities; each with different duties. Together they comprise the system. They are the Rent Guidelines Board, the Rent Stabilization Association, the New York City Conciliation and Appeals Board, and the Department of Housing Preservation and Development. The division of powers and responsibilities in each of these



four agencies (2 city, one public and one private) was designed to create a system of checks and balances.

The Rent Guidelines Board is the rate making arm of the system. It is a city agency comprised of two owner representatives and two tenant representatives and five public representatives from whom its chairman is appointed. All of the members including the chairman are designated by the Mayor. It is the rate making arm of the system, meeting annually to review United States Bureau of Labor Statistics and other studies in order to establish new guidelines for leases in existence in the current year. The studies done for and by the Rent Guidelines Board are of costs for items laid down in statutory criteria: labor, fuel, real estate taxes, repair and maintenance, utilities, insurance and prevailing mortgage interest rates.

The industry association established to participate in the regulatory process is called the Rent Stabilization Association.

Owners of rent stabilized properties must join the Association in order to participate in the rent stabilization system. The joining is deemed voluntary because the owner has the alternative choice of standard rent control. The Industry Association is required by law to draft a Code of conduct for its members governing their relationship with their tenants vis-à-vis required services and other incidents of the tenancy. The Code must be consistent with the provisions and intent of the statute and the Code's provisions are subject to review and approval (or rejection) by the City's housing agency, the Department of Housing Preservation and Development. It is also required by law to enroll members, police their conduct and collect sufficient dues from them to defray the administrative costs of other branches of the system, particularly the Conciliation and Appeals Board which is the enforcement arm.

The Conciliation and Appeals Board is an independent, non-governmental public



agency; it serves as the quasi-judicial enforcement arm of the Rent Stabilization Law. It is responsible for resolving disputes between owners and tenants and processing tenants' and owners' applications for relief permitted under the law. The Board's duties include the hearing and determination of tenants' complaints alleging rent overcharges or reductions of services required to be provided, and owners' applications for rent increases based on hardship, and for permission to modify the method of providing services. It has the power to enforce the Law, Code and its decisions by fine, discipline or other sanction and in extreme cases by expulsion from membership in the Rent Stabilization Association which automatically places the apartment or building (as the case may be) under standard rent control, considered a stricter form of regulation. The Board's nine members (four tenants' representatives, four owners'

representatives and the impartial Chairman) are appointed by the Mayor and subject to approval by the City Council.

Finally, the City housing agency, known as the Department of Housing Preservation and Development has overall supervisory authority over the operation of the rent stabilization system because the Statute confers on it the power to review and mandate changes in the regulatory Code drafted by the industry, power to discipline the industry association as a whole (as opposed to actions of individual members which are subject to review and discipline by the Conciliation and Appeals Board) and to police the industry's application of dues collected to insure its use for legitimate costs of running the system.

The separate functions performed by the four branches of the system together comprise the law's administration. While it may seem complex to divide these duties among separate branches, in practice it has



produced a reasonably satisfactory operation, given the highly charged atmosphere generated in this particular field of regulation.

## FACTS PERTAINING TO THIS APPEAL

The appellant is the owner of a luxury apartment building located at 750 Park Avenue on the Upper East Side of Manhattan, New York. There are 62 dwelling units in the building; all of which are subject to the Rent Stabilization Law of New York City as amended by the ETPA of 1974.

When the Rent Stabilization Law became law on May 12, 1969, the owner joined the Rent Stabilization Association, thus placing the premises under stabilization rather than standard rent control.

Once the building became rent stabilized, the free market rents which the owner had charged before the law took effect became the initial stabilized rents upon which future increases would be calculated (the law took effect on May 12, 1969). At the same time all of the services which the owner provided in the building under free market conditions before the law took effect became "required services" which the owner



would be obligated to continue to provide so long as the building remained subject to rent stabilization (the law designated May 31, 1968 as the base date for required services).

During the time when the building was operated on the free market (including May 31, 1968) the owner protrayed the building to prospective tenants as a "full service" building, and, in keeping with the characterization, provided 24 hour manned elevator service. However, less than two years after the owner had joined the Rent Stabilization Association, he sharply curtailed the hours of this service without consulting with the tenants or seeking permission from the Board. Some of the tenants complained to the Rent Stabilization Association; one of the tenants filed a formal complaint with the Conciliation and Appeals Board. The complaint alleged that the curtailment of manned elevator service had resulted in a reduction in building security. After service on the

owner and processing of the case was completed including development of a full record on the issue, the Board issued an order and opinion on October 14, 1971 (Order Number 1545). In its ruling, the Board found that 24 hour manned elevator service was a required service, having been provided on the statutory base date. The Board's order further stated that the Rent Stabilization Law and Code prohibits the evasion of the lawful stabilized rent by, among other things, the modification of required services, and by virtue thereof, the Board directed the owner to restore the service in full.

The owner commenced a proceeding for judicial review of the Board's order pursuant to Article 78 of the New York Civil Practice Law and Rules. The Supreme Court of the State of New York, County of New York affirmed the Board's determination in all respects in Matter of Insjarl Realty Co. v. Conciliation and Appeals Board, N.Y.L.J., June 1, 1972, p. 17, col. 4 (Sup. Ct., N.Y.



Co., Spector, J.). Thereafter, the owner restored 24 hour manned elevator service in accordance with the Board's order and continued to provide the service until 1975.

However, in 1975, the owner served upon the tenants notice that he intended to completely eliminate manned elevator service at the building despite the outstanding order of the Board requiring full maintenance of this service. Thereupon the Board's Compliance Division served written notice upon the owner, advising him that he could not unilaterally eliminate services; that such action would constitute a willful violation of the Board's order and that if the owner wished to seek permission to alter services lawfully, the proper procedure would be to make application to the Board for approval.

The owner acknowledged receipt of the Board's warning but proceeded in disregard thereof to terminate manned elevator service without further notice, insisting he was

not "terminating" the service, but merely "substituting" another (i.e., mechanical devices instead of manned elevators). Thus, the owner asserted that he was fully meeting his obligations under the Board's 1975 order by substituting a closed circuit television monitor for elevator operators, claiming the monitors would provide the same level of security. Thus, the owner reasoned,his substitution of television cameras for elevator operators did not require the Board's approval notwithstanding the notice to him by the Board. The tenants thereupon filed a second formal complaint regarding this seeming disregard of the Board's directives.

An oral hearing was conducted (the decision to hold a formal hearing rather than determining the matter on the basis of written submissions rests within the discretion of the Board; such hearing is not required by statute). At the hearing, testimony was taken and documentary evidence



introduced under the supervision of the Board's hearing officer, and a tape recorded record was made of the entire proceedings. The proffered evidence showed the physical layout of the building—its various entrances, public areas, stairwells and elevators, i.e., the areas in which the building is vulnerable to intruders. The evidence also showed the various security-related services which each building employee provided before, as compared to after the elevator operators were dismissed, and the function which was currently being performed by the television monitor.

The owner appeared personally at the hearing and was represented by counsel. The owner's attorney called several witnesses to testify on the owner's behalf and to sponsor the introduction of documentary evidence. He also took the opportunity to cross-examine the witnesses who testified on behalf of the tenants. In addition, the

owner's attorney submitted lengthy memoranda setting forth in detail the owner's allegations of fact and legal arguments.

The evidence adduced at the hearing generated no material issue of fact. There was no dispute as to physical layout of the building, the employees' duties before and after the dismissal of the elevator operators, or the operation of the television monitor.

Based upon the entire record, the Board concluded that the measure of building security which was provided by the elevator operators was not compensated for by the installation of a television monitor. This conclusion was based in part upon the uncontroverted fact that the owner, in terminating manned elevator service, had reduced by one third the entire staff employed at the building, and that as a result all of the duties which had previously been performed by two full-time employees—the doorman and the elevator operator—had



been transferred to a single employee—the doorman. The Board found that all of the security related functions and other duties which were previously performed by the doorman and elevator operators could not possibly be carried out by the lone doorman, even with the help of a television monitor. Accordingly, the Board found that the owner's termination of 24 hour manned elevator service unlawfully diminished required services at the subject building.

The Board found that the owner's unilateral termination of 24 hour manned elevator service directly contravened the Board's earlier order which had been specifically addressed to this issue and which order had been challenged by the owner and affirmed in the Court. The Board voted that the owner's action also disregarded the notice warning the owner of such fact and directing him not to proceed as indicated. Accordingly, the Board found that the owner's violation was willful,

and, within its statutory authority, imposed a fine of $3,500.00. The Board directed the owner to forthwith restore manned elevator service.



PROCEEDINGS IN THE NEW YORK COURTS

The owner commenced a proceeding in Supreme Court, New York County for judicial review of the Board's order pursuant to Article 78 of the New York Civil Practice Law and Rules, obtaining an order from the Court staying enforcement of the Board's order pending hearing and determination of the proceeding in Court. The court subsequently dismissed the owner's petition in all respects, thus vacating the stay.

The owner then took an appeal to the Appellate Division, First Department and again secured an interim stay of the Board's order. In the Appellate Division, a panel of five justices unanimously affirmed the judgment of the lower Court without opinion which again vacated the stay. The same Court thereafter denied the owner's motion for reargument or, alternatively for leave to appeal to the Court of Appeals of the State of New York.

Finally, without seeking an interim stay, the owner made a motion for leave to appeal to the New York Court of Appeals (under New York

Appellate practice there is no appeal as of right from the order of an Appellate Division unanimously affirming the judgment of a lower Court). The New York Court of Appeals denied the owner's motion for leave to appeal. During this entire period, extending over a period of sixteen months, the tenants continued to be without this service.

SUBSEQUENT PROCEEDINGS BEFORE THE BOARD

Despite the expiration of the last Court ordered stay of the Board's order, the owner made no efforts to comply with the Board's direction that he restore manned elevator service, nor did he pay the fine. Many efforts were made by the Board's compliance division to obtain the owner's compliance. Finally, after more than four months of such efforts, the Board invoked its power to expell the owner from the Rent Stabilization Association (thereby placing the building under the jurisdiction of the Office of Rent Control), suspending the collection of guidelines rent increases, subject to a condition subsequent



that in the event the owner restored manned elevator service and paid the $3500.00 fine within seven days, such expulsion would not occur. The Board further found that the owner having collected full guidelines increases during this period without providing full services rewarded the owner improperly and therefore, the Board provided for compensatory rent reductions while manned elevator service was improperly withheld. Upon issuance of this, the Board's third order on the same issue, the owner finally paid the fine earlier imposed and restored the service.

## APPLICABLE PROVISIONS OF THE RENT STABILIZATION LAW AND IMPLEMENTING CODE

The obligation of members of the Rent Stabilization Association to provide required services, including elevator and protective services, is based upon Section YY51-6.0, subdivision (c)(8) of the Rent Stabilization Law, which:

> "...requires members of the Rent Stabilization Association to maintain all services furnished by them on May thirty-first, nineteen hundred sixty-eight, in connection with the leasing of the dwelling units covered by this law..."

Pursuant to the above statutory provision, Section 62 of the Rent Stabilization Code was adopted by the Rent Stabilization Association, with the approval of the Housing and Development Administration (predecessor of the Department of Housing Preservation and Development) prohibiting the evasion of stabilized rents by modifying services provided or required to be provided to the tenants as follows:



"SECTION 62

> The stabilization rents and other requirements provided in this Code shall not be evaded, either directly or indirectly, in connection with the renting or leasing or the transfer of a lease of dwelling units by requiring the tenant to pay or obligate himself for membership or other fees, or by modification of the practices relating to payment of commissions or other charges, or by modification of the services furnished or required to be furnished with the dwelling units, or otherwise." (Emphasis Provided).

Section 2(m) of the Code defines "required services" including protective and elevator services, as those services which were furnished or required to be furnished on May 31, 1968 and all additional services provided or required to be provided thereafter, as follows:

> "Section 2(m) 'Required Services': (1) that space and those services which were furnished or required to be furnished for the dwelling unit on May 31, 1968, and all additional services provided or required to be provided thereafter or with respect to a building subject to the RSL pursuant to Section 421 of the Real Property Tax Law, the date of issuance of the permanent Certificate

of Occupancy and all additional services provided or required to be provided thereafter. These shall to the extent so furnished or required to be furnished, include repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, telephone, elevator service, removal of refuse and janitorial services and ancillary services including but not limited to garage space and services, protective services and recreational facilities." (Emphasis Provided).

The Board's authority to impose sanctions upon members of the Rent Stabilization Association for their failure to fulfill their obligations under the Rent Stabilization Law and Code and orders of the Board is based upon Section YY51-6.0 subsivision b of the statute. Under this section each member of the real estate industry stabilization association is required to agree in writing to comply with the law and Code and abide by orders issued by the Conciliation and Appeals Board, as follows:

"(4) each member is required to agree in writing to comply with the Code and to abide by



orders of the Conciliation and Appeals Board; and (5) the association is of such character that it will be able to carry out the purpose of this law."

Section YY51-6.0 of the Law requires that the Code adopted by the real estate association include provisions which, inter alia, authorize the Conciliation and Appeals Board to impose such sanctions as fine, censure or termination of the owner's membership in the Rent Stabilization Association upon finding that the owner has violated the Rent Stabilization Law, Code or an order of the Conciliation and Appeals Board. This section states, in pertinent part:

"c. A code shall not be approved hereunder unless it appears to the housing and development administration that such code***

(10) specifically provides that if a member fails to comply with any level of fair rent increase established under this law or any order of the Conciliation and Appeals Board or is found by the Conciliation and Appeals Board to have harassed a tenant to obtain vacancy of his housing accommodation, he

shall not be a member in good standing of the association; (11) for any violation of the articles, code or other rule or regulation of the association, other than those specified in subparagraph (10) immediately preceding, members shall be appropriately disciplined by such sanction as fine or censure;***"

Sections 7 and 8 of the Rent Stabilization Code serve to implement the above statutory prescription, as follows:

"SECTION 7

A member shall forfeit his status as a member in good standing and shall have his membership with respect to the entire building or any dwelling unit therein suspended or terminated pursuant to an order of the CAB, in the event said Board determines that with respect to one or more dewlling units in the building he has either:

(a) willfully exceeded the level of fair rent increase established by the RSL, the Guidelines Board, or this Code. All charges in excess of the level of fair rent increases shall be deemed willful unless the member proves otherwise, or,



(b) has refused to abide by an order of said CAB within ten days of the date of issuance of such order, or

(c) has been found by the CAB to have harassed a tenant to obtain vacancy of his apartment."

"SECTION 8.

Any action of any member constituting a violation of the RSL or this Code other than a violation as described in section 7, shall result in such discipline, fine or sanction, as may be determined by the Board of Directors of the Industry Association or the CAB."

## ARGUMENT

This case does not raise a substantial federal question warranting an appeal to the United States Supreme Court for the following reasons:

1. The Supreme Court has in previous opinions repeatedly and consistantly rejected the contentions made by appellant that rent regulatory laws in general constitute a taking without just compensation or an impairment of contract rights.

2. The Supreme Court has previously determined that no substantial federal question was raised by an appeal from an order of the New York Court of Appeals upholding the constitutionality of the Rent Stabilization Law, and the appellant has failed to cite any authority or evidence of record which calls for a different conclusion in the case at bar.

3. The appellant's due process rights were amply protected where he was afforded a full oral hearing at which he personally

appeared with counsel, presented the testimony of witnesses on his behalf, cross-examined all adverse witnesses, and made extensive written submissions setting forth his allegations of fact and legal arguments, and where the evidence adduced at the hearing presented no material question of fact to be resolved by the Board.

1. THE SUPREME COURT HAS REPEATEDLY CONSIDERED THE CONSTITUTIONALITY OF RENT REGULATORY LAWS, AND HAS CONSISTENTLY FOUND IN FAVOR OF THEIR VALIDITY.

The Supreme Court has upheld laws regulating residential rents against myriad constitutional challenges. In so doing, the Court has rejected the exact contentions made by this appellant and has held that such laws do not violate due process, Bowles v. Willingham, 321 U.S. 503, 517 (1944); that such laws do not deny equal protection, Woods v. Lloyd W. Miller Co., 333 U.S. 138, 145 (1948); that such laws do not effect a taking of property without compensation,



Block v. Hirsh, 256 U.S. 135 (1921); and such laws do not result in an impairment of contract rights, Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 198 (1920); Edgar A. Levy Leasing Co.v. Siegel, 258 U.S. 242 (1922). In the above cited cases, the Supreme Court established a principle which applies universally to all rent regulatory statutes—that the constitution does not bar the state from exercising its police power to protect the public welfare by regulating rents, services and evictions in residential dwellings. Thus, although these cases involved statutes which predated the Rent Stabilization Law, the principle established by the Court is nevertheless dispositive of the appellant's current challenge to the constitutional validity of the Rent Stabilization Law.

The questions which the appellant seeks to resurrect herein are: 1) whether rent regulatory laws constitute a taking of property without compensation and 2) whether

such laws constitute an impairment of contract rights. The Supreme Court's disposition of the question of taking without compensation is best expressed in the opinion of Justice Holmes in Block v. Hirsch (supra). In concluding that real property is not exempt from state regulation, Justice Holmes wrote as follows:

> "The fact that tangible property is also visable tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. (citations omitted). These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not



> perceive any reason for denying the justification held in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing..." 256 U.S. 155.

With regard to the question of an impairment of contract rights, the Supreme Court's views were best expressed in its opinion in Home Building and Loan Association v. Blaisdell, 290 U.S. 398 (1933). In the Home Building case, Justice Hughes, in reviewing the Court's decisions involving rent regulatory statutes, concluded as follows:

> "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interest, have inevitably led to an increased use of the organization of society in order to protect the very bases of

> individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends." 290 U.S. 442.

Thus, it is manifest that the Supreme Court has long since placed at rest any doubt that the state's exercise of its police powers to promote the public welfare through regulation of residential rents does not do violence to an individual's property or contract rights under the Constitution. Furthermore, the New York Court of Appeals has reached the same conclusion in numerous cases involving constitutional challenges to the rent control laws. Pitts v. McGoldrick, 103 N.Y.S.2d 875, aff'd 302 N.Y. 938, 100 N.E.2d 191 (1951); Gauthier v. Gabel, 44 Misc.2d 887, 255 N.Y.S.2d 200, aff'd 16 N.Y.2d 720, 262 N.Y.S.2d 105 (1965); Hartley



Holding Corp. v. Gabel, 13 N.Y.2d 306, 247 N.Y.S.2d 97 (1963); I.L.F.Y. Co. v. City Rent Administration, 11 N.Y.2d 480, 230 N.Y.S.2d 986 (1962); Bucho Holding Co. v. State Rent Comm., 11 N.Y.2d 469, 230 N.Y.S.2d 977 (1962); Teeval Co. v. Stern, 301 N.Y. 346 93 N.E.2d 884 (1950); Loab Estates, Inc. v. Druhe, 300 N.Y. 176, 90 N.E.2d 25 (1949) and Wasservogel v. Meyerowitz, 300 N.Y. 125, 89 N.E.2d 712. Hence, the appellant's effort to resurrect this dead issue through an appeal to the United States Supreme Court must fail. Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311.

2. **THE SUPREME COURT HAS PREVIOUSLY DETERMINED THAT NO SUBSTANTIAL FEDERAL QUESTION WAS RAISED IN AN APPEAL FROM AN ORDER OF THE NEW YORK COURT OF APPEALS UPHOLDING THE CONSTITUTIONALITY OF THE RENT STABILIZATION LAW.**

The Supreme Court has dismissed an appeal for want of a substantial federal question in a case involving a broadly based constitutional challenge in which the New York Court of Appeals had previously reviewed and upheld the constitutionality of the Rent Stabilization Law. Matter of 8200 Realty Corp. v. Lindsay, 27 N.Y. 2d 124, 313 N.Y.S. 2d 733 (1970) reversing 34 A.D.2d 79, 309 N.Y.S.2d 443 (1st Dept., 1970) and reinstating 60 Misc.2d 384, 304 N.Y.S.2d 384 (Sup. Ct., N.Y. Co., 1969, Gellinoff, J.) appeal dismissed for want of a substantial federal question 400 U.S. 962, 27 L.E2d 381, 91 S.C. 367.

The constitutional questions raised in the 8200 Realty case prompted the New York Court of Appeals to make a thorough analysis of the



statutory underpinnings of the Rent Stabilization Law, the reasons for its enactment, and the structure of the regulatory system created by the law. Upon completion of this comprehensive review, the Court of Appeals declared its conviction that the law was constitutionally sound.

The Court delved deeply into the legal and factual basis for the regulation of rents in post World War II buildings, and for the creation of a separate regulatory system in which owners participated and received more favorable treatment than under the Rent Control Law. The Court noted the reasons why post-war buildings were not previously regulated, but also observed that "by 1968 there was a rapid and radical change in the situation which created a serious housing crisis." In this regard the Court stated as follows:

> "The prior statutory scheme of rent control under title Y had left post-1947 housing rentals uncontrolled. It was assumed in 1962 and for some time thereafter that as to that type of housing,

the market, governed by supply and demand, would work reasonably and controls would be unnecessary. But by 1968 there was a rapid and radical change in the situation which created a serious housing crisis which the city felt obligated to meet." 27 N.Y.2d 136, 313 N.Y.S. 2d 742.

The Court went on to identify some of the conditions which evidenced a serious housing crisis in post war dwellings. The Court cited rent increases averaging 30% and reaching 60% and a housing shortage demonstrated by a vacancy rate in 1968 of 1.23%. Referring to an affidavit by Jason R. Nathan, the Administrator of the City's Housing and Development Administration (now called the Department of Housing Preservation and Development) the Court observed as follows:

> "The Nathan affidavit shows that commencing in the middle of 1968 a steadily growing volume of complaints were received by the city against increases in rent in the uncontrolled sector averaging 30%, and ranging as high as 60%, over pre-existing rents which were forcing large numbers of tenants to leave the city. Investigation disclosed that housing shortages had developed to the extent the vacancy rate had dropped from



> 3.19% in the spring of 1965 to 1.23% in the spring of 1968." 27 N.Y.2d 136, 313 N.Y.S.2d 742.

Noting that owners were active participants in the rent stabilization system and received more favorable treatment (i.e. financially) under this law, the Court found that this was a reasonable legislative means of encouraging new construction of dwellings, which the Court recognized as the "ultimate solution to the housing shortage." In this respect the Court held as follows:

> "It is clear that the differential in severity of control and the device of bringing the industry into a helpful role in regulation were both aimed at the 'ultimate solution to the housing shortage' which was the encouragement of 'new construction". 27 N.Y.2d 136, 313 N.Y.S.2d 742.

The Court went on to explain the basis for its conclusion through the following quotation from Mr. Nathan's affidavit:

> "In the post 1947 housing, although the housing shortage and landlord profiteering urgently required measures to halt the rent spiral, there was simultaneously widespead fear that the imposition of rent controls might delay the ultimate solution to the housing shortage by discouraging some

the market, governed by supply and demand, would work reasonably and controls would be unnecessary. But by 1968 there was a rapid and radical change in the situation which created a serious housing crisis which the city felt obligated to meet." 27 N.Y.2d 136, 313 N.Y.S. 2d 742.

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> landlords for hardship increases above fixed rentals. Although the association establishes this Board as part of the condition of approval and provides the funds for its operation, the Mayor appoints the members of the Board." 27 N.Y.2d 131, 313 N.Y.2d 738

The owner in 8200 Realty also argued that the role given the industry association to draft a regulating Code and police subject members also constituted an unlawful delegation of quasi legislative and quasi judicial powers. The Court rejected these contentions as follows:

> "[2] Whatever delegation may be said to have come down to the Real Estate Industry Association described in this statute, closely circumscribed and regulated as this is, no one could seriously entertain a fear that government has yielded any real sovereign power. Certainly no "legislative power" has been passed on under any possible conception of that term."
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> * * *
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> "The over-all supervision of the regulatory process is vested in the Housing and Development Administration which is expressly authorized to enact rules and regulations for the implementation of the statute (§YY 51-4.0, subd. c); to approve the code of an association (§YY 51-6.0, subd. b, par. [2]), and to discipline an association (subd. d)." 27 N.Y.2d 131, 313 N.Y.2d 738.
>
> * * *
>
> "The right of any member aggrieved

new construction. The compromise solution ultimately suggested by the Mayor and adopted by the New York City Council takes both factors into consideration. Thus the industry self-regulation pattern puts a brake upon run-away increases, but it does permit a great deal of freedom for landlords to increase rents within reasonable limits and thus to enjoy quite profitable operations of their properties..." 27 N.Y.2d 136, 313 N.Y.S.2d 742.

In addition to finding no constitutional infirmity in rent stabilization's more favorable treatment of owners, the New York Court of Appeals also upheld the Rent Stabilization Law against charges that it represented an unconstitutional delegation of quasi judicial enforcement powers to the Conciliation and Appeals Board. The owner had argued that the Board was not a public agency but an adjunct of the Industry Association (RSA) because it was wholly funded thereby. In rejecting that contention the Court of Appeals stated:

"The members of an association must also adhere to the limitations on rent increases fixed, as it has been noted, by the Rent Guidelines Board, and the Conciliation and Appeals Board has the power to hear complaints by tenants against landlords and requests by



Realty. Indeed, the appellant cites no case in which an appellate court has ever found any aspect of a rent regulatory law unconstitutional.

The appellant bases his constitutional challenge upon sweeping assertions such as: "...the law depends upon the existence of an emergency which did not exist at the time of the law's enactment and does not presently exist." (Jurisdictional Statement, page 4). Yet appellant has not brought to the Courts one iota of evidence showing that the legislatures of the City and State of New York were in error in finding that a housing emergency existed, warranting the passage of the Rent Stabilization Law.

Moreover, it is a matter of public record that the City Council's periodic review of New York City's vacancy rate and other factors concerning the housing market has been based upon a substantial body of objective, factual material.* Therefore, the Council's conclusion

*For example, when the City Council first enacted
(continue on next page)

(and that of the State Legislature in renewing the enabling legislation) that a housing emergency continues to exist in New York City requiring the continued regulation of rents in privately owned buildings with six or more rental units is reasonably and soundly grounded.

The State Enabling Act specifically provides that every three years the City Council must make a de novo evaluation of the continued need for regulation. The regulatory laws thus have a limited life. In accordance with the State legislature's mandate, the City of New York, prior to reviewing the expiring rent laws and the advisability of renewing or terminating same, engages the Bureau of the Census to conduct a special census survey of the City's rental housing stock. On the

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the Rent Stabilization Law in 1969, the Council had before it such documents as a report by the Bureau of the Census of the United States Department of Commence, released December 13, 1968 and based upon an investigation conducted between April 15, 1968 and June 15, 1968, as well as a report dated February 1969 by the Housing and Development Administration, Department of Consumer Affairs entitled Report to the Mayor on Investigation into Rental Increases in the Non-Controlled Housing Market.



basis of that census survey and testimony and data provided by recognized experts in urban housing, and concerned citizens (owner and tenant alike) the City Council decides whether a housing emergency still exists in the City of New York warranting the continuation of rent regulation for another period of time.

In light of the foregoing, the appellant's contention that the Rent Stabilization Law is unconstitutional on the ground that no housing emergency exists in New York City cannot be taken seriously.

Finally, in the Jurisdictional Statement the appellant, in calling upon the Supreme Court to hear and consider his proposition that the Rent Stabilization Law is unconstitutional, gives the impression that this contention was the locomotive which propelled him through the state judicial appeal system to the highest Court in the land. However, the truth is that in the New York Courts this constitutional argument invariably tagged along at the end of appellant's train of thought like a nearly forgotten caboose. Should the Supreme Court now show greater

enthusiasm for appellant's constitutional arguments than he himself was able to muster in lower courts? It is respectfully submitted that the answer is an unqualified "no". U.S. Fidelity and Guaranty Co. v. State of Oklahoma, 250 U.S. 111 (1919).

Significantly, the focal point of appellant's case in the New York Courts was the contention that the Board had erred in concluding that the owner was obligated under applicable statutory and Code provisions to continue to provide manned elevator service. This contention has been repeatedly heard and rejected by the Appellate Division, First Department in four cases involving nearly indentical facts to those in the case at bar, and the New York Court of Appeals has repeatedly refused to hear appeals in all of the cases of this nature in which leave to appeal has been sought. Matter of 75 East End Owners, Inc. v. Prince 61 A.D.2d 918, 403, N.Y.S.2d 166 (1st Dept., 1978) aff'g N.Y.L.J. April 18, 1977, p. 13, col. 2 (Sup. Ct., N.Y. Co., Helman, J.) motion for leave to appeal



denied 42 N.Y.2d 801 (1978); Matter of Sommer v. Prince, 59A.D.2d 535, 389 N.Y. 791 (1st Dept., 1976), aff'g N.Y.L.J., March 4, 1975, p. 13, col. 3 (Sup. Ct., N.Y. Co., Gellinoff, J.), motion for leave to appeal denied, 41 N.Y. 2d 801, 396 N.Y.S. 2d 1027 (1977); Matter of Century Operating Corp. v. Prince, —A.D.2d—, 415 N Y.S. 2d 1000 (1st Dept., 1978) aff'g N.Y.L.J., December 26, 1978 p. 12 col. 1 (Sup. Ct., N.Y. Co., Bloom, J.)(not otherwise reported); Matter of Century Operating Corp. v. Prince, —A.D.2d—, N.Y.L.J., October 1, 1979 p. 11 col. 3 (1st Dept., 1979) aff'g N.Y.L.J., December 2, 1977 p. 5 col 3 (Sup. Ct. N.Y. Co. Greenfield, J.)(not yet officially reported)

### 3. THE BOARD FULLY PROTECTED APPELLANT'S DUE PROCESS RIGHTS BY AFFORDING HIM AN AMPLE OPPORTUNITY TO BE HEARD.

The Board is under no obligation to hold hearings in cases arising before it; it may hold hearings or informal conferences within its sound discretion when the written record is not complete. In this case, a hearing was held. As to the adequacy of the owner's opportunity to be heard, the record speaks for itself. A cursory glance at the administrative record in this case compels the conclusion that the appellant was not only afforded ample opportunity to be heard, but he took full advantage of this opportunity. The appellant appeared at the hearing held at the Conciliation and Appeals Board with counsel, presented testimony of witnesses on his behalf, was afforded the right to and did in fact cross-examine adverse witnesses, and supported his testimony with extensive written submissions setting forth his allegations of fact and



legal arguments.

The evidence adduced at the hearing presented no material question of fact to be resolved by the Board. The physical layout of the building, the duties of the building employees before and after the dismissal of the elevator operators, and the function performed by the television monitor were all undisputed. The case boiled down to one question of law: whether the replacement of manpower to manually operate the elevators with closed curcuit television constituted the same base date service to which the tenants were entitled and for which they had been paying rent and rent increases over the years.

Appellant's argument that he was denied his constitutional right to be heard because the Board is beset by a heavy caseload and therfore might have been too busy to apprise itself of the appellant's allegations of fact and legal arguments in rendering its determination is not sustained

by even a cursory review of the record. The full Board reviewed the case; each and every document in the file was examined, not only by staff in presenting the case to the Board, but by a member of the Board assigned by the Chairman for such review. A written recommendation setting forth all salient facts including all of appellant's arguments and factual allegations was distributed to the entire Board a full week before the Board met to deliberate thereon.

Therefore, it is speculation on appellant's part that the Board did not have time to review the matter and a particularly unsavory kind of speculation at that. Such charge might be leveled at any judicial or quasi-judicial body which has its share or more of a heavy workload of public responsibility. The only true criteria for determining whether there was full deliberation, aside from a presumption of regularity, is the record and final order. In this case, the record and orders issuedby the Board



leave no uncertainty that this appellant was given full and thorough consideration.

Nor may appellant attack the procedures followed by the hearing officer assigned by the Board to conduct the hearing. None of the procedural requirements cited by the appellant are applicable to hearings at the Conciliation and Appeals Board. Since it is well settled that the Conciliation and Appeals Board is not required by law to even hold an oral hearing prior to the Board rendering a determination, it need not adhere to the technical procedural requirements suggested by appellant, procedures more appropriate to trials and/or formal hearings mandated by statute.

There is no statutory requirement that the Board conduct an oral hearing of the parties, and in the absence of such a requirement the Courts have uniformly held that the decision to hold an oral hearing rests within the discretion of the adminis-

trative agency. Due process requires only that tenants be afforded a reasonable opportunity to be heard. Matter of Friedman v. Conciliation and Appeals Board, N.Y.L.J., December 20, 1977, p. 5, col. 3 (Hughes, J.), aff'd.—A.D.2d—, 406 N.Y.S.2d 982 (1st Dept., 1978); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1969); Matter of Knapp v. Altman, 29 N.Y.2d 588, 324 N.Y.S.2d 315 (1971).

The Federal Courts have also concluded that a satute which permits the administrative agency to determine within its discretion whether to hold an oral hearing of the parties or to decide a proceeding on written submissions is not violative of due process of law. In Matter of Mkwanznzi v. Kenray Associates, Inc. v. City of New York, Docket No. 68 Civ. 4116 (S.D.N.Y., 1969)(not officially reported), app. dism. 410 F.2d 1143 (2d Cir., 1969) the Federal District Court stated:

> "Due process does not mandate that an administrative hearing



> must be a triable-type evidentiary hearing. The type of hearing—trial, oral argument or written submissions—is best determined by the nature of the issues to be decided and in affect of the resulting orders. The general procedure followed by the Administration of deciding applications for rent orders or written submissions is not violative of due process.***"

So, too, Matter of Davenport v. Berman, 420 F.2d 294 (2d Cir., 1969), aff'g Docket No. 68 Div. 4984 (S.D.N.Y., 1969).

Furthermore, where the evidence adduced generates no triable issues of fact to be resolved by the administrative agency, due process does not require an oral hearing. Anti-Defamation League of B'Nai B'rith, Pacific Southwest Regional Offfice U.F.C.C., 403 F.2d 169, 131 U.S. App. D.C. 146, Certiori denied 89 S. Ct. 1190, 394 U.S. 930, 22 L.Ed.2d 459 (1968). In the Anti-Defamation League case, the Court held as follows:

> "Our examination of the record satisfies us that the Commission acted within its authority in denying an eviden-

> tiary hearing as to the undisputed facts which formed the basis for Appellant's claims. The disposition of Appellant's claims turned not on determinations of facts but inferences to be drawn from facts already known and the legal conclusions to be derived from those facts." 131 U.S. App. D.C. 148.

In this case a hearing was held and we believe the record amply demonstrates that said hearing, in keeping with the nature of the proceeding, was full and fair. By its conduct and the other opportunities afforded appellant to support its position with written submissions, the appellant was fully heard.



## CONCLUSION

Wherefore, Appellee respectfully submits that no substantial federal question is raised warranting appellate review by the United States Supreme Court, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the order entered by the Supreme Court of the State of New York, Appellate Division, First Department.

Respectfully submitted,

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